IN THE

Supreme Court of the United States

No. 36. October Term, 1944.

MICHAEL F. McDONALD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

FREDERICK E. S. MORRISON,
JOHN W. BODINE,
1429 Walnut Street,
Philadelphia, Penna.,
For Petitioner.

DRINKER BIDDLE & REATH,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of The Tax Court of the United States, written by Judge Hill, and not reviewed by the Tax Court, was promulgated March 10, 1943, appears in the Record at pages 115a to 119a, and is reported at 1 T. C. 738. The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge McLaughlin, was filed December 9, 1943, appears in the Record at pages 122a to 126a, and is reported at 139 F. (2d) 400.

JURISDICTION.

The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the Third Circuit on writ of certiorari is provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347), and Section 1141 (a)

of the Internal Revenue Code (53 Stat. Part 1, 164, 26 U. S. C. A. Sec. 1141). The judgment of the United States Circuit Court of Appeals was entered on December 9, 1943 (R. 127a). Petition for writ of certiorari was granted by this Court on April 10, 1944 (R. 128a).

QUESTIONS PRESENTED.

1. Where petitioner was appointed a judge of a Pennsylvania county court in 1938 on condition that he would campaign for election in 1939, for a full term, and he did so campaign and was defeated, may he deduct from his 1939 taxable income the lawful expenses of his campaign, as

   (a) ordinary and necessary expenses incurred in his trade or business, or as

   (b) ordinary and necessary expenses incurred for the production or collection of income, or as

   (c) a loss incurred in a transaction entered into for profit?

2. If, on the Tax Court's findings of fact, this Court cannot hold that the expenses are deductible, did the Tax Court err in making inadequate findings of fact from the evidence admitted, or did the Tax Court err in excluding the additional evidence, offered on behalf of the petitioner, showing that the expenses were ordinary and necessary?

STATUTES INVOLVED.

The pertinent provisions of the Internal Revenue Code and of the Treasury Department Regulations are set forth in the appendix, as are the pertinent provisions of the Pennsylvania Election Code.

STATEMENT OF THE CASE.

Petitioner, who had been a practicing lawyer in Luzerne County, Pennsylvania, since 1904, was appointed on December 1, 1938, by Governor Earle of Pennsylvania to fill the unexpired term of a Common Pleas Judge of Luzerne

County (R. 28a). Under Pennsylvania law, appointees to Common Pleas Courts must stand for election at the next primary and general elections, if they wish to continue in office (R. 29a). The term for which petitioner was appointed accordingly expired December 31, 1939, and it was a condition of the Governor's appointment of petitioner thereto that he would be a candidate on the Democratic ticket for the succeeding full term of ten years, beginning on January 1, 1940 (R. 36a). His compensation as judge was $12,000. per annum (R. 29a), and under the Pennsylvania Constitution this could not be reduced during his term of office. *Bailey v. Waters*, 308 Pa. 309.

In accordance with the condition attached to his appointment, petitioner was a *bona fide* candidate at the primary election [1] of September 12, 1939, and at the general election of November 7, 1939. He was opposed at both elections. He was successful at the primary election, but was defeated at the general election (R. 29a).

In order to obtain, for his candidacy at each election, the support of the County Committee of the political party which was his sponsor, petitioner was obliged to pay and did pay out of his own funds in 1939 assessments toward the campaign expenses of the Committee, fixed by its Executive Committee, in the amount of $8,000. (R. 29a, 30a, 36a, 37a, 49a, 69a, 70a). The assessment for the primary campaign was paid to the Primary Campaign Committee, and that for the general election to the County Committee itself, through their respective treasurers (R. 28a, 29a). In addition, he incurred and paid in 1939 out of his own funds other necessary expenses, directly in connection with and for the purpose of furthering his nomination and elec-

[1] All elective public officers in Pennsylvania (except Presidential electors) must first be nominated at a direct primary election, at which the voters of each political party select, in a manner provided by the Election Code, the nominees of their respective parties. Sec. 902, Pennsylvania Election Code, 1937 P. L. 1333; 25 Purdon's Statutes, Sec. 2862.

tion, in the sum of $5,017.20 (R. 30a). These two sums, aggregating $13,017.20, he claimed in his Federal income tax return for the year 1939 as a deduction for "re-election expenses" incurred in his campaign for election to retain his office as Judge of the Common Pleas Court of Luzerne County (Respondent's Exhibit A, R. 105a). Petitioner's books are regularly kept on the cash receipts and disbursement basis and were so kept in 1939, and his 1939 income tax return was prepared on that basis (R. 28a).

As stated by the Circuit Court of Appeals in this case, "The expenses here were strictly in compliance with the state statute and legitimate in their entirety . . . The objective of the expenditures was to obtain a considerable amount of money over at least a decade of years." (R. 122a, 123a).

The party committees, to which petitioner paid the $8,000. mentioned above, were set up and maintained in accordance with the Pennsylvaina Election Code,[2] and the Tax Court found as a fact that Petitioner's payment of the committees' assessments was essential to his securing the nomination and the support of the party organization (R. 116a). The testimony showed without contradiction that Petitioner had no voice or control whatever in fixing the amount of the assessments, which, with those similarly exacted by the committees and paid by the nine other candidates sponsored by the same political party running for office (including another Common Pleas Judge running for another vacancy), was fixed on the basis of the total prospective salaries to be received (R. 36a-38a, 49a, 50a, 61a-65a, 68a-70a). Petitioner's prospective salary was $12,000. per year for the ten-year period.[3] The sums so assessed

[2] Extracts from the Pennsylvania Election Code are set out in the Appendix, p. 36, *infra*.

[3] The ten-year term is fixed by the Pennsylvania Constitution, Article 5, Section 15. The salary is fixed by the Act of May 16, 1929, P. L. 1780, Sec. 4; 17 Purdon's Statutes 834.

against the petitioner and his fellow candidates were used by the committees to defray expenses of postage, advertising, meetings, clerk hire, and other similar items, in connection with the election campaign of all the candidates (R. 47a, 60a-65a, 69a-72a; Exhibits 2 and 3, R. 79a-103a).

During the period that petitioner served as Judge, including the period of the campaign, he did not practice law or engage in any business or profession other than that of performing his duties as Judge and campaigning for election to retain that office, nor would Pennsylvania law have permitted him to practice law or engage in any other business (R. 41a, 45a). Such campaigning as petitioner did personally was proper and did not interfere with the performance of his judicial duties (R. 38a). There was no finding by the Tax Court or by the Circuit Court of Appeals that Petitioner's campaign expenses were not reasonable in amount, or that they were not ordinary and necessary for the attainment of Petitioner's object the retention of his public office.

Petitioner paid the 1939 Federal income tax, shown to be due by his return, of $1,018.02 (R. 28a). Respondent claimed $2,506.77 additional on the ground that petitioner's deduction for election expenses was unauthorized by the tax law. Respondent's claim was sustained by the Tax Court and by the Circuit Court of Appeals, which action petitioner now asks this Court to reverse.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in failing to hold;

1. That the expenditures in question were ordinary and necessary expenses incurred in petitioner's trade or business, and therefore were deductibe under Section 23 (a) (1) (A) of the Internal Revenue Code, or

2. That said expenditures were ordinary and necessary expenses incurred for the production or collection of income, and therefore were deductible under Section 23 (a) (2) of the Internal Revenue Code, or

3. That upon petitioner's failure to retain his office, he sustained a loss in the amount of said expenditures, in a transaction entered into for profit, which loss was deductible under Section 23 (e) (2) of the Internal Revenue Code, or

4. That the Tax Court erred in excluding evidence as to whether the expenses in issue were ordinary and necessary, and in making inadequate findings of fact.

SUMMARY OF ARGUMENT.

This is an important case, dealing for the first time with a problem common to holders of elective office in many parts of the United States, where campaign expenses are a legitimate factor in the process of electing public officers. In view of the necessarily high rates of income tax at present, and their probable continuance for some time to come, unless such expenses are allowable as income tax deductions, many persons lacking substantial financial means, but otherwise duly qualified to run for office, cannot afford to do so.

The campaign expenses in issue in this case were recognized by the law of Pennsylvania as usual and proper, and, looked at realistically as instances of the practical matters with which the Federal law of taxation on "net" income deals, they were either

(1) ordinary and necessary expenses incurred in the petitioner's trade or business, or

(2) ordinary and necessary expenses incurred for the production of income, or

(3) a loss incurred in a transaction entered into for profit.

On any of these grounds they should be allowed as deductions. And if, on the Tax Court's findings of fact, this Court cannot hold that the expenses are deductible, the case should be remanded, for more adequate findings of fact, or to permit the taking of testimony erroneously excluded, or both.

ARGUMENT.

1. The Question Whether Legitimate Campaign Expenses Are Deductible From the Taxable Income of the Candidate Incurring Them Is One of Great Public Importance.

This case raises, for the first time, an issue of national importance to our citizens in connection with the selection from among them of the best available talent to serve and conduct our democratic government, local, state and federal. The issue is whether one holding elective public office—in this case a state office—and in good faith seeking to continue in office by nomination and election, may deduct, under the clear provisions of the Internal Revenue Code, as ordinary and necessary expenses in computing his net income subject to federal income tax, the legitimate expenses of his election campaigns, where he has fully complied with the laws of his state in incurring only such necessary expenses as are permitted thereby, and where he has duly reported and made public record of all of his expenses in accordance with state law.

The particular question is believed to have been presented to a Circuit Court of Appeals, and to be now presented to this Court, for the first time in this case. The novelty of the case is not surprising, as the salaries of state and local officers have been subject to federal income tax only since the enactment of the Public Salary Tax Act of 1939, and the number of federal elective officers is relatively small. The question involves a large proportion of all the officers seeking election to succeed themselves in states where ordinary and necessary campaign expenses have statutory recognition as a legitimate factor in the functioning of the democratic process. The high rates of income tax applicable to individuals give this case far-reaching effects upon the central machinery of our democracy—the system by which the attention of the electorate is focused upon the issues and personalities involved in an

election. This case is accordingly not only a case of first impression, but also of unusual significance.

An example illustrates the importance of this problem. Assume a person holding an elective public office, which, like the Petitioner's, carries a salary of $12,000. per year, and who has interest payments, taxes, and other non-campaign deductions, credits, and personal exemption totaling $2000., leaving taxable income of $10,000., before deducting campaign expenses. Under the tax law in force in 1944, the top rate of income tax applicable to this income is 37%, and the average rate approximately 30%. If the person seeking that office incurs in good faith expenses for his nomination and election campaigns, the disallowance of a deduction for those expenses will substantially increase his tax burden. Such an increase in tax might not trouble the candidate with large financial means or capital, whether or not invested in tax-exempt securities, since he could afford to finance his campaign and his tax from his substantial capital. But the candidate who has little or no capital, who seeks to continue in public office or for the first time to serve in public office, must pay from his modest public salary both his campaign expenses and the heavy additional tax caused by denying him a deduction for the expenses, and this burden may well be a sufficient deterrent to prevent him from running for office at all.

The Revenue Acts levying income tax were never intended to exercise a selective influence on the type of candidates who could afford to run for public office, nor to penalize the self-sufficient candidate who pays for his own campaign expenses from his earnings, in favor of those who pay their expenses from their substantial financial means.

2. The Expenses Paid by the Petitioner in 1939, in Connection With His Campaign for Nomination and for Election to Retain His Office as Judge of the Court of Common Pleas of Luzerne County, Pennsylvania, Constituted an Allowable Deduction From Petitioner's 1939 Taxable Income as "Ordinary and Necessary Expenses Paid or Incurred During the Taxable Year in Carrying on" the Taxpayer's "Trade or Business," Which, in 1939, Was That of Serving as Judge.

Petitioner's Position Constituted a "Business."

The first question presented under this point is whether Petitioner was carrying on a "trade or business" in 1939 within the terms of Section 23 (a) of the Internal Revenue Code.[4]

Petitioner practiced law in Luzerne County from 1904 until December 1, 1938, when he was appointed by the Governor of Pennsylvania to serve as Common Pleas Judge of that County until December 31, 1939. In accepting this appointment, Petitioner had to agree that he would be a candidate, at the Primary and General elections in 1939, to succeed himself for a full term of ten years from January 1, 1940. Accepting the appointment on these conditions, Petitioner served as judge for his appointive term. He was opposed at both elections in 1939, but such campaigning as was required of him did not interfere with his judicial duties. He won the nomination in the Primary, but was defeated in the General election, and after December 31, 1939, returned to his law practice.

During his tenure of office as judge it would not only have been improper and unprofessional, but also illegal, for the Petitioner to have practiced law.[5] Petitioner's in-

[4] For the text of this section, see the Appendix, at page 33, *infra*.

[5] The canons of judicial ethics, as set forth in the reports of the American Bar Association, volume 60 (1935), condemn the practice of law by a judge and provide that

come tax return for 1939 (R. 105a) shows that the Petitioner was not a man of means or one living on the income from investments, his income from such sources in 1939 being less than $1,800. He did not accept the judgeship, as Respondent orally suggested before the Court below, as a hobby or pastime. On the contrary, he was required by his circumstances to obtain compensation for his public service if he was to support himself and his family. Public officials may properly and should accept compensation for their services, and it must follow, from the fact that such compensation is offered, that candidates for office are expected to be motivated in seeking office, at least in part, by the financial compensation attached to such offices.

The circumstances of this case thus fall readily within the definitions of a trade or business found in the statute and laid down by the courts. Section 48 (d) of the Internal Revenue Code provides unequivocally that "The term 'trade or business' includes the performance of the functions of a public office." The Tax Court, per Judge Hill, has recently held that the office of Associate Justice of the North Carolina Supreme Court is a "business". *Barnhill*, Memorandum Decision, T. C. Docket Nos. 37, 38, unreported, but see C. C. H., T. C. Service Dec. No. 13,967 (M); *Winborne*, Memorandum Decision, T. C. Docket No. 58, unreported, but see C. C. H., T. C. Service Dec. No. 13,981 (M).

A system of government which is sufficiently realistic to attract a person to public office by compensating him financially must certainly accept the necessary consequence, namely, that the official so compensated may make his office his source of livelihood and therefore inescapably will make

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a judge should refrain from accepting any professional employment while in office. The controlling statute in Pennsylvania is the Act of April 14, 1934, P. L. 333, 17 P. S. 1607, which provides that "no judge of any court of this Commonwealth shall practice as attorney or counsellor in any court of justice in this Commonwealth or elsewhere . . . " (Section 75).

his office his business. A judicial office, as any other public office, is undoubtedly a position of high public trust, but none the less for income tax purposes it is a business.

The Expenses in Issue Were "Ordinary and Necessary."

The second question presented is whether petitioner's nomination and election expenses incurred to retain his office as judge were "ordinary and necessary" expenses incurred in his business.

The construction of "ordinary and necessary" has been the subject of numerous decisions which are by no means easy to harmonize. The Courts have not been able to lay down standards, but rather have defined a point of view from which the expenditures in question must be considered. In what has been generally recognized as the leading case on this problem, *Welch v. Helvering*, 290 U. S. 111, Mr. Justice Cardozo, speaking for this Court, pointed out that it is the framework of the community as a whole in which the problem must be examined:

> "What is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are *the common and accepted means* of defense against attack . . . *The situation is unique in the life of the individual affected, but not in the life of the group, the community*, of which he is a part. At such times there are *norms of conduct* that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type . . . The standard set up by the

statute is not a rule of law; it is rather a way of life. *Life in all its fullness* must supply the answer to the riddle." 290 U. S. at pages 113 to 115. (Emphasis supplied.)

It follows that the entire process of electing public officers in our democratic form of government is the necessary frame of reference for this inquiry.

Consider first the specific objective of this Petitioner's campaign expenses. He had been appointed to a judicial office, which the law required him to consider as his only occupation. To retain this means of livelihood he had to campaign to succeed himself and to incur the expenses in issue here—indeed, he accepted the appointment on condition that he would so so. If successful in the campaign, he would continue in a position, not only of great dignity and responsibility in the community, but also of unusual security, with moderate financial reward. Under the Constitution of Pennsylvania, his term of office would run for ten years from January 1, 1940, and his compensation was fixed by statute at $12,000 per year, which could not be reduced without his consent, *Bailey v. Waters*, 308 Pa. 309.

To attain this objective to continue in office, he was required by the governmental system of Pennsylvania to present himself and his record to the electorate in his jurisdiction, and he had to do this with sufficient skill and thoroughness to meet the competition of opponents who, in both the primary and general elections, sought to deprive him of his office. His jurisdiction, Luzerne County, covered a very large area, being about fifty miles long and thirty miles wide, and embraced 210,000 registered voters. Further, these voters were extremely varied in their national and racial origin, so that his personality and record had to be presented to different groups of them in different ways, and even in different languages (R. 42a). In order to present himself and his record to these voters, Petitioner had to travel repeatedly through his constituency, to speak over the radio, to issue printed matter through the mail and in

other ways, and to engage clerks and rent typewriters to make possible its issuance.

Furthermore, like practically every constituency in our democracy, the Petitioner's county was thoroughly organized by both major political parties for election campaign purposes. The party sponsoring the Petitioner's candidacy had a county committee of over eight hundred members, being two from each voting precinct. This committee, in turn, had officers and subcommittees. All of these party workers were concerned with the choice of candidates who would appeal to the electorate as suitable public officers, and with the presentation of these candidates and of the issues of each campaign in the way best calculated to assure the successful election of those candidates. If Petitioner was to follow the ordinary procedure to retain his office, it was essential for him to obtain the support of this party organization.

Petifioner testified without contradiction as to the conditions with which he had to comply in order to cooperate with this organization and to have its support (R. 36a, 37a):

> "Q. What did you have to do in order to get the support of the Democratic party?
>
> A. I was obliged to contribute the assessment to the Democratic organization of Luzerne County made by its executive committee.
>
> Q. Were you consulted as to the amount of the assessment?
>
> A. I was not. The amount of the assessment was indicated to me later on.
>
> Q. Did you have any control over fixing the amount of that assessment?
>
> A. I did not. It was take it or leave it.
>
> Q. Would you have had the support of the Democratic organization if you had not agreed to that assessment?
>
> A. I certainly would not."

Mr. Law, chairman of the county committee of the party sponsoring Petitioner's candidacy, also testified (R.

50a) that if any of the candidates of that party, including Petitioner, had not paid his assessment to the organization, he would not have received the organization's support.

Consider further the evidence in this proceeding showing the common and accepted means adopted by other candidates for attaining their election. The committee of the party in the county, in order to defray the necessary expenditures of the campaign, assessed all the candidates on its slate. These assessments were determined by the executive committee, a sub-committee of the county committee, without consultation with the candidates, but were determined approximately in proportion to the total compensation which would be received by the candidates from their respective offices, if they were elected. Exhibits 2 and 3, (R. 79a-103a), which are the accounts of the treasurers of the primary committee and the county committee, respectively, as filed in accordance with the Pennsylvania Election Code, show that these other candidates, like the Petitioner, paid their assessments to the committees and thus, like the Petitioner, also incurred expense in proportion to the compensation which they would respectively receive. See Table of Assessments, Appendix, p. 39, *infra*.

Furthermore, is it not permissible, especially in view of the breadth of this Court's approach to this question in *Welch v. Helvering*, *supra*, to request the Court to take judicial notice of the regular and lawful practice of candidates for office, both local and national, to incur such expenses in furtherance of their elections? Certainly, in the life of the group of which Petitioner is a part, the norms of conduct involve just such expenses as he incurred and paid. Our system of public elections has involved such expenditures for many years, and the practice has even become so ordinary that statutes have been in force for years in many states to recognize and regulate it.[6]

[6] For example, in 1942, the laws of 46 states (including Pennsylvania) required the filing of a statement of campaign receipts and disbursements, the provisions varying as

The Court below suggested that the outlay was "in the nature of a capital item," apparently on the ground, at least in part, that the outlay might never have to be made again by one of the petitioner's age. But this Court, per Mr. Justice Cardozo, held in *Welch v. Helvering, supra,* that an expense may happen only once in a lifetime and yet may be ordinary and necessary. An election may be unique in the life of the individual affected, but it is not unique in the life of our communities. Thus, in *Kornhauser v. United States*, 276 U. S. 145, counsel fees incurred in defense of a suit for accounting brought against the taxpayer by his former partner, though unusual in the experience of the particular taxpayer, were held to be ordinary and necessary within the meaning of the Revenue Act of 1918, the language of which is identical with that in the material portion of the Internal Revenue Code. This same reply was given by Mr. Justice Douglas in *Deputy et al. v. Du-Pont*, 308 U. S. 488, when he said, speaking for this Court, at page 495, "ordinary has the connotation of normal, usual or customary. To be sure, an expense may be ordinary though it happens but once in the taxpayer's lifetime. Yet the transaction which gives rise to it must be of common or frequent occurrence in the *type of business* involved." (Emphasis supplied.) This test was also applied in *Commissioner v. Heininger*, 320 U. S. 467, where this Court said, "For the respondent to employ a lawyer to defend his business from threatened destruction was 'normal'; it was the response ordinarily to be expected." Any person in any way familiar with public life in the United States

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to whether the statement is required of candidates or parties or both, and whether in the primary or general elections or both; and the laws of 31 states (including Pennsylvania) enumerate the types of expenses which are permissible. See *State and Federal Corrupt Practices Legislation*, Sikes; (Durham, 1928); *Corrupt Practices Legislation*, Rocca, (Washington, 1928); and for a recent summary of all state statutory provisions, *Corrupt Practices Legislation in the 48 States*, Minault, (Chicago, 1942).

must recognize that the payment of campaign expenses by candidates is of frequent occurrence, and is ordinarily to be expected.

The essence of Petitioner's campaign was to attract as much support as possible from the voters in his constituency. He sought to keep his name before them, and to appeal to them to exercise in his favor their voting rights as citizens. This process is similar to the appeal by a business concern to the public to buy war bonds or to take part in salvage drives, the expense of such an appeal to the business concern being deductible if it thereby keeps its name before the public and thereby enhances its standing with them. See I. T. 3564, 1942—2 C. B. 87; I. T. 3581, 1942—2 C. B. 88; and I. T. 3593, 1942—2 C. B. 90.

Furthermore, there are numerous instances where the businessman's appeal to public opinion in a legitimate way, to influence governmental action in his favor or to avert threatened governmental attack, has been held to be ordinary and necessary. For example, in *Los Angeles and Salt Lake Railroad*, 18 B. T. A. 468, the Tax Court allowed a deduction as ordinary and necessary expense for assessments contributed by the taxpayer after the last war to a trade association for advertising addressed to the general public, with the acknowledged object of creating a public opinion favorable toward the railroads. If it is ordinary and necessary for a railroad to contribute an assessment to an association which aims to influence public opinion to further the interests of the associates, why is it not equally ordinary and necessary for a candidate for public office to incur expenses in good faith, including the payment of assessments to a party committee, to build up *bona fide* public support for his candidacy? Additional authority for the deduction of assessments contributed to associations which aimed to influence public opinion is found in *Independent Brewing Company of Pittsburgh*, 4 B. T. A. 870; *California Brewing Association*, 5 B. T. A. 347; and *George Ringler & Co.*, 10 B. T. A. 1134. See also *Lucas v. Wofford*,

49 F. 2d 1027. This analogy between holding public office and engaging in commercial enterprise was recognized by Congress in enacting, in Section 48 (d) of the Code, that a public office is a "business" for income tax purposes.

In his concurring opinion in *Commissioner v. Textile Mills Securities Corp.*, 117 F. 2d 62 (later affirmed, 314 U. S. 326), at page 73, Judge Clark of the Third Circuit Court of Appeals offered several tests to be used in construing the words "ordinary and necessary." He first suggested that these words mean whatever is customary or commonplace—apparently the same test as that used in the *Welch* case, *supra*. He next suggests, by analogy to the law of torts, that those expenses are ordinary and necessary which, in the view of the reasonable business man, are reasonably likely to achieve the object for which the expenses are paid. The expenses in the instant case comply with this standard as well as with that laid down in the *Welch* case, for here the reasonable man would know that expenses to present the Petitioner's record to his constituency would undoubtedly tend toward winning votes for him.

A further test suggested by Judge Clark, and in fact preferred by him, is that the words "ordinary and necessary" should be so construed as best to correlate the work of Congress and the Courts. In the *Textile* case the expenses in question were paid out for lobbying, which has been condemned by the courts as illegal. Judge Clark accordingly held that the expenses were not deductible, since he preferred the view that Congress did not intend to permit deductions for expenses to further illegal acts. Unlike expenses to support a lobby, however, which are vicious because they are secret and color a lobbyist's presentation in a way not known to those before whom he appears, the campaign expenses in the instant case were paid openly, recorded publicly, and recognized as legitimate by the Constitution and laws of Pennsylvania.[7]

[7] The Constitution of Pennsylvania, 1874 P. L. 1, 17, provides an oath of office for all officers, including judges,

It is obvious that no deductions should be allowed for lobbying expenses, or for contributions made secretly to influence a campaign from behind the scenes, in a way not subject to public review. In the instant case, however, the amounts spent, the things for which they were spent, and the ultimate object in view—petitioner's retention of his elective public office—were all matters of public knowledge and were recognized by the public as legitimate. The result is that, adopting this last and preferred test of Judge Clark, these lawful expenses in the instant case are clearly deductible.

It follows, under the tests established by these decisions, that Petitioner's expenses were ordinary and necessary, were incurred in a trade or business, and therefore are deductible.

The Opinion of the Court Below.

In the Circuit Court opinion under review, McLaughlin, J., speaking for the Court, does not oppose Petitioner's contention that the expenses in issue were ordinary and

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which includes the words, ". . . that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing, to procure my nomination or election, (or appointment) *except for necessary and proper expenses expressly authorized by law*; . . ." (emphasis supplied). Furthermore, the Act of 1874, P. L. 64, authorized specified types of campaign expenses of a candidate.

The relevant sections of the law now in force, the Election Code of 1937, are set forth in the Appendix hereto for the convenience of the Court. See pp. 36-38, *infra*. The particular expenses in the instant case are set forth in Exhibits 2 and 3 (R. pp. 79a, 89a). They clearly come within the types permitted by the State Election Code, and the record herein shows that all the requirements of the Election Code with respect to reporting these expenses were complied with. In these circumstances there can be no doubt that the expenses in issue were recognized as legitimate by the law of Pennsylvania, and the Circuit Court of Appeals has so held.

necessary. He relies rather on an unreal separation between Petitioner's act of running for election on the one hand and his continuing to perform the functions of his office on the other.[8] This unrealistic division of Petitioner's activities in 1939 into water-tight compartments, as though each had no relation to the other, not only flies in the face of the fact that Petitioner's running for election was a condition of, and therefore inextricably tied in with, his original appointment, but also is inconsistent with the fact that the only reason any one would consider running for office is so that the office, with its responsibilities and privileges, could subsequently be occupied. Judge McLaughlin felt that the expenses incurred had "not the slightest relationship to the functioning of the judicial office"; but how could the Petitioner have continued to be a judge and hence to have continued to perform those functions without first incurring the election expenses? The interrelation between

[8] Judge McLaughlin cites in this connection the Tax Court decision in *Reed v. Commissioner*, 13 B. T. A. 513 (reversed on another issue, 34 Fed. (2d) 263, reversed 281 U. S. 699), where voluntary contributions to a party organization by a practicing lawyer who was a candidate for the Senate were held not deductible. That case is not binding here, but in any event is clearly distinguishable. There was no evidence in that case that the taxpayer was required to make the contributions to obtain the party's support, or that other candidates, benefited by the taxpayer's contributions, themselves made contributions to benefit the taxpayer. Nor was there any evidence in that case that the contributions were fixed by the proper agency of the party, so as to bear a fair relation to the respective financial interests of the candidates in the outcome of the election.

Judge McLaughlin also cites *Lindsay v. Commissioner*, 34 B. T. A. 840, where a Congressman already in office was denied a deduction for traveling expenses to consult his constituents. That case is likewise not binding here, but is readily distinguishable, as there was no evidence that Lindsay was a candidate for re-election, and the expenses accordingly could not have been necessary to enable him to retain his livelihood.

holding office and running for election to continue in office is even stronger in this case, since it is found as a fact that Petitioner, as a condition of his appointment, agreed to run for election in 1939. In the light of all the circumstances of this case, can it truly be said that one activity—running for election—really had "not the slightest relationship" with another activity—holding office as judge—where the one was not only the ordinary and necessary means of continuing the other, but was also agreed to be done before the other could even begin?

It is respectfully submitted that in his opinion Judge McLaughlin overlooked the well-established distinction between those expenses incurred to pay for preliminary training in the expectation of later entering a given profession or field of work, and those expenses incurred to obtain a specific position or to keep abreast of developments in a field of work which has already been entered into. Thus the expense of attending law school is not deductible, O. D. 452, 2 C. B. 157, whereas subscriptions paid by a practicing lawyer for legal periodicals are deductible. O. D. 785, 4 C. B. 130. Similarly the expense of one training to be a professional singer for his life's work is only preparatory to a subsequent holding of a position as a singer, if he ever obtains one, and hence is not deductible, *Driscoll*, 4 B. T. A. 1008, but the training expenses of an actor to keep himself in good physical condition and thus to enable him to retain his present position, like the election expenses of one already qualified for the office, are deductible. *Hutchison*, 13 B. T. A. 1187; *Denny*, 33 B. T. A. 738. The rulings of the Commissioner permit a member of a labor union to deduct from his taxable income not merely his union dues, O. D. 450 (1920), 2 C. B. 105; I. T. 2888, XIV–1 C. B. 54, but now also the initiation fee essential to his originally joining the union to acquire specific employment. I. T. 3634, 1944, I. R. B. No. 1, p. 11. In other words, if an employee may deduct the fee required to obtain a job in a closed shop, why should not the equally

inescapable campaign expenses to obtain a public office be deductible? And in *Commissioner v. Heininger*, 320 U. S. 467, this Court was dealing with a closely analogous tax problem. There the taxpayer, a dentist, selling false teeth by mail, was faced with a fraud order which, if enforced, would have put him out of business. However, as this Court found, "he did not voluntarily abandon the business, but defended it by all available legal means." Similarly, wher confronted with the expiration of his term, Petitioner did not voluntarily abandon his public office, which was his livelihood, but rather defended it by every legal means—that is, he was a candidate to continue in his position. Why should not Petitioner's lawful expenses in defending his business position be deductible, just as this Court held that Heininger's were?

A case clearly illustrating the proper deductibility of expense to obtain a specific position is *Madge H. Evans*, Memorandum Decision, B. T. A. Docket No. 89,374, unreported, but see C. C. H., B. T. A. Service, Dec. No. 10,620-D. In that case the taxpayer, a celebrated movie actress, was employed in this country under a yearly contract, which her employer had the option to renew. In 1934, while she was still employed under the contract, the taxpayer feared that her employer might not renew the contract for 1935. The taxpayer accordingly sent her mother, who was her business representative, on a trip to England to explore the possibilities of obtaining employment with British film producers, the taxpayer paying the expenses of the trip. While the mother was abroad, the daughter's American contract was renewed, and, the mother's trip having thus become unnecessary, she returned to this country. The Board (now the Tax Court) held that the expenses of the mother's trip, to the extent of that part of the trip spent on the negotiations with the London producers, were deductible by the taxpayer as ordinary and necessary business expenses. It is submitted that this case presents a very close analogy to the case at

bar. Like the Petitioner in the instant case, Miss Evans was already well established in her profession, but feared that she might lose her position. She incurred the expenses in an effort which, like the Petitioner's, turned out to be fruitless. Nevertheless it was held that such expenditures, which were paid by a taxpayer already engaged in a given employment, in order to assure its continuance, were deductible as ordinary and necessary expenses, even though the payments were fruitless.

The tax is on net income; and since Petitioner, like Miss Evans, must be taxed on the compensation received, fairness and equal treatment require that he be allowed, as she was, to deduct his reasonable expenditures, paid by him in a *bona fide*, though unsuccessful, effort to assure the continuance of his compensation from his public office.

3. In the Alternative, the Said Expenses Constitute an Allowable Deduction From Petitioner's 1939 Taxable Income, as "Ordinary and Necessary Expenses Paid or Incurred During the Taxable Year for the Production or Collection of Income," Within the Meaning of Section 23 (a) (2), Added to the Internal Revenue Code by Section 121 (a) of the Revenue Act of 1942.

Section 121 (a) of the Revenue Act of 1942 adds to section 23 (a) of the Internal Revenue Code the following new subsection:

> "(2) Non-Trade or Non-Business Expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

Section 121 (d) makes this amendment retroactive and effective with respect to the taxable year 1939, here involved.

The Report of the House Committee on Ways and Means with respect to this amendment [9] shows that the intention was to allow a deduction for expenses incurred for the production or collection of income, whether or not the income is sought to be produced during the taxable year or during previous or subsequent years. The Report of the Senate Finance Committee is to the same effect.[10]

In other words, if it should be considered that the expenditures incurred were not ordinary and necessary expenses incurred by Petitioner in his business, certainly the payments in question were expenses necessarily incurred for the production of income, since their payment was essential to Petitioner's continuance in the office on which his income depended. His judicial position produced practically all of petitioner's taxable income, and he incurred the expenses here involved in order to continue this income over the ten years following the election. It is true that section 23 (a) (2) was the result of a Congressional desire to allow the type of deductions disallowed by *Higgins v. Commissioner*, 312 U. S. 212. But the Congressional reports show no intent to limit this amendment to investors' expenses, and the language of the new section itself permits the deduction, not only of expenses for the "management, conservation, and maintenance of *property*," but also for any "expenses paid for the production or collection of *income*." In *Higgins v. Commissioner* (6/30/44), C. C. A. 1, 143 F. 2d 654 (a separate and later case from that cited above), the Court stated that, to be allowable, the expense need only bear "a reasonable and proximate relation to the production and collection of income."

In the instant case, the petitioner incurred the expenses in issue in direct relation to the production of his income from his judicial position. In these circumstances, even if it should be held that the expenses in issue were

[9] 1942-2 C. B. 410, 429.
[10] 1942-2 C. B. 570.

not deductible under section 23 (a) as it stood before the recent amendment, it is clear that the amendment permits their deduction because of their "reasonable and proximate relation" to the production of the petitioner's income.

The Court below referred in this connection to the Regulations of the respondent, now embodied in Regulations 111, Section 29.23 (a)-15, which state, in part, "Among the expenses not allowable under Section 23 (a) (2) are . . . campaign expenses of a candidate for public office." In the many years since the first income tax legislation, there has been no such provision anywhere in the respondent's Regulations, until the above provision was published in T. D. 5196 (1942—2 C.B. 96), and even now there is no such provision in the Regulations applicable to business expenses or to losses. T. D. 5196 was approved on December 8, 1942, almost three months *after* the Tax Court hearing in the instant case. Thus throughout the period of less than two years since this Regulation was first issued, the deductibility of a candidate's campaign expenses has been under judicial consideration in the instant case. In these circumstances, it is submitted that this provision certainly does not have the force of law here, and is entitled to little, if any, more weight than any other statement of his position by the respondent herein.

4. In the Alternative, the Petitioner Sustained During 1939, in Connection With His Campaign for Nomination and Election to Retain His Office as Judge as Aforesaid, a Loss in a Transaction Entered Into for Profit.

In considering this alternative ground it is important to bear in mind that the allowability of such a loss rests on fundamentally different factors from those supporting the deduction of business expenses. The statute does not require that a loss suffered in a transaction entered into for profit be "ordinary and necessary". *W. R. Harvey*, 25 B. T. A. 1282, at p. 1291. It is not even necessary that

a loss be incurred in a trade or business, since the term "loss" is much more comprehensive. *Ernest E. Lloyd*, 8 B. T. A. 1029. It is only necessary that the loss be incurred in a transaction entered into for profit.

In the instant case, these requirements are clearly met. That the Petitioner entered this transaction (that is, made every lawful effort to retain his office) for profit has been shown above. And the Petitioner undoubtedly suffered a loss to the extent of the incurred expenditures in issue when he was deprived of his public office by his defeat at the polls.

In his opinion under review, Judge McLaughlin seems to have been under some difficulty in disallowing the deduction as a loss. He states that the Petitioner "received what he paid for" and therefore did not lose anything. But such an approach to the question of what is a deductible loss is far from adequate. If a taxpayer buys a valuable share of stock, for example, he undoubtedly gets what he pays for; but this does not prevent him from deducting a loss when that stock becomes worthless. An inventor who hires laboratory assistants, buys materials, and incurs other development expenses in testing a proposed new article or product clearly gets the valuable services and materials for which he pays, and yet the entire expenses will be deductible as a loss if the invention in question proves to be a failure. *Weingarten, Inc.*, 44 B. T. A. 798 (Acq.); *Dresser Mfg. Co.*, 40 B. T. A. 341 (Acq.); *Acme Products Co., Inc.*, 24 B. T. A. 194 (Acq.). A businessman who sends an agent abroad to develop new business undoubtedly receives the services he pays for, but if the venture is unsuccessful, he still may claim the expense as a deductible loss. *Pope*, Memorandum Decision, B. T. A. Docket No. 105643, unreported; but see C. C. H. B. T. A. Service, Dec. No. 12,572—H; I. T. 1505, I—2 C. B. 112. And one who pays to explore a mining or quarrying property gets the exploratory services paid for, but may claim a loss if the materials sought are not found. *Gopher Granite Co.*,

5 B. T. A. 1216; *Parker*, 1 T. C. 709. A taxpayer gets something of value for every reasonable expenditure, whether it be a capital or expense item, and this does not prevent his deduction of a loss.

An inventor incurs his expenditures while developing his product, and expects his profit from its later performance, the whole process of development and performance being considered for tax purposes as the "transaction" which is entered into for profit. Similarly, in this case, the Petitioner incurred his campaign expenditures while running for election and expected his financial gain from continuing to perform the functions of his office. For tax purposes, the whole process of campaigning for election to a particular office and holding that office is the "transaction" which he entered into for profit. Judge McLaughlin attempts to divorce campaigning from office-holding, so as to hold the loss on the one not allowable because it is, in his view, unconnected with the financial return from the other. But this wholly artificial division of what is clearly one "transaction" has no support whatever in the authorities. See the cases cited in the previous paragraph, and *Stokes v. U. S.* (1937), 19 F. Supp. 577 (D. C., S. D.—N. Y.), where Mandelbaum, D. J., allowed as a loss deduction the expenses of publishing the last volume of a series of books, although on the facts the last volume could not by itself have possibly produced a profit.

Judge McLaughlin bases his definition of a loss on the following quotation from *Dresser v. U. S.*, 55 F. 2d 499, at p. 510. "A loss in order to be deductible under the statute must be an unintentional parting with something of value." An examination of this case shows that the taxpayer was seeking a deduction for the cost of stock which was already worthless when he bought it, and this was properly disallowed. The petitioner here, however, was paying his money for "something of value"—namely, the hire of clerks, postage, and the like; but these "things of value" became valueless to him upon his defeat at the

polls, which was certainly "unintentional." This defeat, by depriving him of his office, and of the profit he intended to make therefrom, caused his loss. It is not the expenditure of the taxpayer's money which must be unintentional, but rather the frustration of the ultimate object for which the money was spent. A taxpayer to whom a loss on worthless stock is allowed intended to pay the purchase price of the stock, but did not intend that expenditure to become fruitless.

The Circuit Court below also quotes from *Giurlani & Bro. Inc. v. Commissioner*, 119 F. 2d 852, where the taxpayer paid the debts of its supplier without taking any subrogation or other consideration. The Court disallowed the payment as a loss, since there was no evidence that the payment could have been of any business advantage to the taxpayer (indeed, it seemed likely that the payment was a gift to relatives), and since, if it was of benefit, the benefit could last for an indefinite period. This is far from the instant case, where the financial benefits from success in the election are obvious, and where the loss from defeat was complete in 1939.

The established types of allowable losses were also overlooked by the Court below in its holding that the campaign expenses were not deductible as ordinary and necessary expenses because "in the nature of a capital item." Even the cost of a capital item is deductible if the anticipated profit from its purchase is irretrievably lost, as happened here upon petitioner's defeat at the polls. The Court below relied on two of its former decisions, *Clark Thread Co. v. Com'r* and *Newspaper Printing Co. v. Com'r*, where the taxpayers' expenditures *achieved* their object. If the Court below had quoted further from *Clark Thread Company v. Commissioner*, 100 F. 2d 257, it would have referred to this passage: "Provision is made in the income tax law for the charging off of such assets over a period of years, where their duration is limited. The Board was also of the opinion that the benefits in this case were of indefinite duration and made no allowance for exhaus-

tion." If the present petitioner had been successful, his expenses (assuming that it would be proper to capitalize them, as Judge McLaughlin suggests) would have had a duration no longer than his ten-year term of office, and under the tax law would have been deductible ratably over that period of time.[11] In the instant case, however, if the expenditures were so capitalized, they would have no duration whatever after the general election in 1939, since he was then unsuccessful in achieving the object for which they were incurred. The *Clark* case and the similar case of *Newspaper Printing Company v. Commissioner*, 56 F. 2d 125, are thus in no sense applicable here.

Petitioner may have received the personal services, postage, committee support, and so on, for which he paid, but when he lost the election he lost his chance to recoup his cost (the expenditures in issue) of placing himself in a position to make the profit for which he entered the transaction; and it is when the taxpayer is involuntarily shut out from such recoupment that the statute grants him a deduction for such expenditures as a loss.

To permit the opinion of the Court below on this point to stand unmodified is to cast doubt on many established types of losses and to spread error and confusion in the tax law far beyond the facts of the instant case.

5. If This Court, on the Record Herewith Presented, Cannot Hold That the Expenses in Issue Are Deductible, the Proceeding Should Be Remanded to the Tax Court With Directions to Admit Testimony (Erroneously Excluded by Judge Hill) of Similar Facts and Opinion Testimony Showing That the Expenses in Issue Were Ordinary and Necessary, and Thereupon to Make Appropriate Findings of Fact.

Where the question at issue is whether certain expenses were "ordinary and necessary", it has already been shown, on the highest authority,[12] that the experience of

[11] Cf. Regulations 111, sec. 29.23 (l)—3.

the whole community must be examined, in order to determine the "norms of conduct" which are controlling. Accordingly, the Petitioner sought to introduce, at the hearing in this proceeding before Judge Hill, the testimony of the chairman of the County Committee of the political party sponsoring petitioner's candidacy, and of the Treasurer of that Committee, both of whom had had extensive experience with campaigns in petitioner's constituency, as evidence of similar facts, showing the course of conduct of other candidates for public office in that constituency, and as opinion testimony, showing that such expenses were, in the opinion of the witnesses, customary there. This testimony was uniformly excluded by Judge Hill (R. 52a-58a; 73a-74a). It thus became impossible for Petitioner to introduce evidence regarding the similar expenses of other candidates in similar campaigns, the amounts spent by such other candidates, the purposes for which their expenses were disbursed, and the results of such disbursements. Petitioner was also denied the opportunity to present the opinion testimony of these witnesses, whose long experience in such campaigns certainly qualified them to give such testimony, as to whether the expenses paid by Petitioner helped his candidacy, whether the assessments paid to the party committees by the other candidates running with Petitioner helped his candidacy, and generally whether in the light of their experience in that constituency, they would say that in their opinion such expenses were not only ordinary but also necessary to attain Petitioner's objective.

The exclusion of this testimony is in marked contrast to the rulings of the Tax Court in other cases involving the problem whether expenses were ordinary and necessary. For example, in *Goedel*, 39 B. T. A. 1, the question was whether an odd-lot broker, who had to take a considerable position in the market, could deduct, as an ordinary and necessary business expense, the cost of insurance on President Roosevelt's life, taken as protection in the event that

findings of fact and opinion by Judge Harron, which were reviewed by the Board, show that testimony was admitted to prove that, many years before, one of the taxpayer's partners had feared loss through an individual's death, had contemplated insurance, had failed to take it out, and had lost heavily; to prove that the markets declined drastically upon the deaths of Presidents Garfield and McKinley; and also that stockholders in companies in which J. P. Morgan was interested had insured his life. Testimony was admitted of the standard forms of business insurance. In this *Goodel* case, the Tax Court held that the expense was not ordinary and necessary, principally on the ground that the expense was unique in the business history of the country. The opinion pointed out particularly that no testimony had been introduced showing the purchase of any such insurance by any other firm. Plainly the Tax Court felt in that case that evidence of similar facts was of critical importance in a proceeding involving this question. Other illustrations are found in *Rees*, 21 B. T. A. 698, where a taxpayer in the tallow business was allowed to deduct the expenses of entertaining customers because they were "within the limits customary in this line of business"; *George Bernards, Inc.*, 8 B. T. A. 716, where the testimony of taxpayer's competitors was admitted to show the reasonableness of salaries paid by the taxpayer; and *N. Y. Talking Machine Co.*, 13 B. T. A. 154; *Wm. S. Gray & Co. v. U. S.*, 35 F. 2d 968; and *Botany Worsted Mills v. U. S.*, 278 U. S. 282, where evidence of salaries paid in similar businesses was likewise admitted and relied on.

Testimony of the conduct of others similarly situated is particularly valuable in a case like the one at bar, where the expenses were incurred as part of a common effort by a number of individuals, that is, of the Petitioner and his running mates, to achieve a result desired by all of them. For example, in *Robert Gaylord, Inc.*, 41 B. T. A. 1179, and *Maloney Electric Co.*, 42 B. T. A. 78, the question was whether various non-banking business houses in St. Louis

could deduct, as ordinary and necessary business expenses, the amounts spent by them pursuant to their respective guaranties of a St. Louis bank which had been in danger of closing. Although the payments were probably unique in the business life of these taxpayers, copious evidence was admitted to show that other banks and business houses in St. Louis gave similar guaranties. Judicial notice was taken of general banking conditions in 1931 and of the methods used to remedy them, both in St. Louis and in other sections of the country. And the Tax Court permitted proof of the entire mutual effort of the participating concerns.

Furthermore, opinion testimony was extensively relied on in the *Gaylord* case. The taxpayer's president was permitted to testify as to the business necessity of giving the guaranty, since otherwise the taxpayer would, in his opinion, have suffered heavy losses. The President of the Clearing House was also allowed to give his opinion as to such necessity and the losses taxpayer would have suffered had it not participated. Similar opinion testimony was admitted in *First National Bank of Skowhegan*, 35 B. T. A. 876, which was likewise an effort to rescue a weak bank. And in *Alabama Cooperage Co.*, 18 B. T. A. 1287, the testimony was admitted of two witnesses with long experience in operating mills similar to the taxpayer's, to show that the "salaries paid to petitioner's officers in the taxable year constituted in their opinion reasonable compensation for the services rendered". Such salaries are, of course, claimed as deductions as ordinary and necessary expenses. *N. Y. Talking Machine Co., supra.*

It is submitted, with all due respect, that Judge Hill's rulings on the evidence in this case were flatly contrary to the practice of the Tax Court in those and many other cases, and that if this Court cannot hold for the Petitioner here, the case should be remanded to the Tax Court with directions to admit the erroneously excluded testimony and to make appropriate findings of fact thereon.

For the foregoing reasons, it is submitted that the expenses in issue should be allowed as deductions, or, if necessary, that the proceeding be remanded.

FREDERICK E. S. MORRISON,
JOHN W. BODINE,
1429 Walnut Street,
Philadelphia, Penna.,
For Petitioner.

DRINKER BIDDLE & REATH,
Of Counsel.

Appendix.

INTERNAL REVENUE CODE.

Section 23 (a). Expenses.—

(1) Trade or business expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity . . .

(2) Non-trade or non-business expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

(e) Losses by individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business;

REGULATIONS.

Regulations 101.

Article 23 (a)—1. BUSINESS EXPENSES.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, . . . Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see Article 23 (a)—2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. . . . The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though such expenses exceed the gross income derived during the taxable year from such business. . . .

Regulations 111.

Section 29.23 (a)—15. NON-TRADE OR NON-BUSINESS EXPENSES.—(a) *In General.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23 (a) (2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above. . . .

The term "income" for the purpose of section 23 (a) (2) comprehends not merely income of the taxable year but

also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. For example, if defaulted bonds, the interest from which if received would be includible in income, are purchased with the expectation of realizing capital gain on their resale, even though no current yield thereon is anticipated, ordinary and necessary expenses thereafter incurred in connection therewith are deductible. Similarly, ordinary and necessary expenses incurred in the management, conservation or maintenance of a building devoted to rental purposes are deductible notwithstanding that there is actually no income therefrom in the taxable year, and regardless of the manner in which or the purpose for which the property in question was acquired. Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto. The expenses, however, of carrying on transactions, which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses.

Expenses, to be deductible under section 23 (a) (2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

Regulations 101.

Article 23 (e)—1. Losses by Individuals.—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, . . .

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. . . .

PENNSYLVANIA ELECTION CODE.

1937 P. L. 1333, 25 P. S. 2600.

Section 1602 (25 P. S. 3222)—Every political committee shall appoint and constantly maintain a treasurer to receive, keep and disburse all sums of money which may be collected or received by such committee, or by any of its members for primary or election expenses; and unless such treasurer is first appointed and thereafter maintained, it shall be unlawful for a political committee or any of its members to collect, receive or disburse money or incur liability for any such purpose. All money collected or received by any political committee, or by any of its members for primary or election expenses, shall be paid over and made to pass through the hands of the treasurer of such committee and shall be disbursed by him; and it shall be unlawful for any political committee, or any of its members, to disburse any money for primary or election expenses, unless such money shall have passed through the hands of the treasurer. 1937, June 3, P. L. 1333, art. XVI, Sec. 1602.

Section 1606 (25 P. S. 3226)—No candidate or treasurer of any political committee shall pay, give or lend or agree to pay, give or lend, directly or indirectly, any money or other valuable thing or incur any liability on account of, or in respect to, any primary or election expenses whatever, except for the following purposes:

First. For printing and traveling expenses, and personal expenses, incident thereto, stationery, advertising, postage, expressage, freight, telegraph, telephone and public messenger service.

Second. For the rental of radio facilities, and amplifier systems.

Third. For political meetings, demonstrations and conventions, and for the pay and transportation of speakers.

Fourth. For the rent, maintenance and furnishing of offices.

Fifth. For the payment of clerks, typewriters, stenographers, janitors and messengers actually employed.

Sixth. For the transportation of electors to and from the polls.

Seventh. For the employment of watchers at primaries and elections to the number and in the amount permitted by this act.

Eighth. For expenses, legal counsel, incurred in good faith in connection with any primary or election. 1937, June 3, P. L. 1333, art. XVI, Sec. 1606.

Section 1607 (25 P. S. 3227)—(a) Every candidate for nomination or election, and every treasurer of a political committee, or person acting as such treasurer, shall, within thirty days after every primary and election at which such candidate was voted for or with which such political committee was concerned, if the amount received or expended or liabilities incurred shall exceed the sum of fifty dollars, file a full, true and detailed account, subscribed and sworn to by him, setting forth each and every sum of money received, contributed or disbursed by him for primary or elec-

tion expenses, the date of each receipt, contribution and disbursement, the name of the person from whom received or to whom paid, and the specific object or purpose for which the same was disbursed. Such account shall also set forth the unpaid debts and liabilities of any such candidate or committee for primary or election expenses, with the nature and amount of each, and to whom owing. In the case of the treasurer of a political committee, the account shall include any unexpended balance of contributions or other receipts appearing from the last previous account filed by him. In the case of candidates for election who have previously filed accounts of their primary expenses as candidates for nomination, the accounts shall only include receipts, contributions and disbursements, subsequent to the date of such prior accounts.

(b) If the aggregate receipts or disbursements and liabilities of a candidate or a political committee in connection with any primary or election shall not exceed fifty dollars, the candidate or treasurer of the committee, as the case may be, shall, within thirty days after the primary or election, certify that fact under oath to the officer or board with whom expense accounts are required to be filed, as hereinafter provided: Provided, however, That if a candidate or political committee does not receive any contributions or make any disbursements or incur any liabilities, he or it shall not be required to file any account or to make any affidavit, but such candidate or political committee shall be deemed for all purposes of this act to have filed an expense account showing no receipts, disbursements or liabilities for primary or election expenses.

(c) Every expense account filed under the provisions of this section shall be accompanied by vouchers for all sums expended amounting to ten ($10) dollars or more. It shall be unlawful for any candidate, agent or treasurer to disburse any money received from any anonymous source. 1937, June 3, P. L. 1333, art. XVI, Sec. 1607.

Name of Candidate (Per Exs. 2 & 3, R. 69a, Appendix, p. 41, *infra*)	*Office* (Appendix, p. 41, *infra*)	*Term of office in years*	*Total Salary*		Assessment *Primary* (Per Ex. 2)	Assessment *General Election* (Per Ex. 3)
M. F. McDonald (Petitioner)	Judge of Common Pleas	10 (a)	$120,000.	(b)	$1,000.	$7,000.
John H. Bonin	Judge of Common Pleas	10 (a)	120,000.	(b)	958.	9,000.
Edward F. McGovern	District Attorney	4 (c)	30,000.	(d)	500.	2,000.
Lester Thomas	Sheriff	4 (c)	24,000.	(e)	500.	3,000.
John Kridlo	County Treasurer	4 (c)	24,000.	(e)	450.	1,500.
Stanley Leonard	Coroner	4 (c)	12,000.	(f)	350.	1,200.
Joseph Bialogowicz	Recorder of Deeds	4 (c)	20,000.	(g)	350.	1,325.
Ralph Gitz	Register of Wills	4 (c)	16,000. plus	(e)	500.	3,000.
John A. Reily	Commissioner	4 (c)	24,000.	(h)	500.	3,000.
Stanley S. Janowski	Commissioner	4 (c)	24,000.	(h)	500.	2,000.

(a) Penna. Constitution, Article 5, Sec. 15.
(b) 1929 P. L. 1780, Sec. 4; 17 P. S. 834.
(c) 1929 P. L. 1278, Sec. 31; 16 P. S. 51.
(d) 1931 P. L. 401, Sec. 246; 16 P. S. 246.
(e) 1876 P. L. 13, Sec. 13, as amended; 16 P. S. 2291; Pennsylvania Manual, 1941 edit., p. 863.
(f) 1927 P. L. 348, Sec. 1; 16 P. S. 2294.
(g) 1927 P. L. 516, Sec. 1; 16 P. S. 2292.
(h) 1927 P. L. 403, Sec. 1; 16 P. S. 2542.

LUZERNE COUNTY GENERAL ELECTION

(Tuesday, November 7, 1939)

Supreme Court Judge	1st D	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Herbert F. Goodrich (D.)	11,356	9,716	11,426	8,972	9,991	10,685	15,438	77,583
Marion D. Patterson (R.)	11,559	11,683	9,752	10,172	13,408	14,274	18,460	89,307

Superior Court Judge (3)	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
J. Harold Flannery (D.)	11,891	10,068	12,657	9,364	10,632	11,987	16,728	83,347
E. J. Thompson (D).....	11,350	9,707	11,409	8,951	9,975	10,676	15,370	77,438
William H. Keller (D.)...	11,317	9,708	11,372	8,938	9,964	10,633	15,320	77,252
Thomas J. Baldrige (R.)..	11,263	11,417	9,281	9,950	13,105	13,654	18,057	86,687
William E. Hirt (R.).....	11,322	11,491	9,566	10,008	13,153	13,936	18,236	87,712
William H. Keller (R.)...	11,470	11,566	9,624	10,104	13,255	14,064	18,366	88,449

Common Pleas Court (2)	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John H. Bonin (D).....	13,733	10,608	11,952	9,907	10,783	11,515	15,976	84,474
M. F. McDonald (D).....	12,030	10,159	12,020	9,168	10,569	11,429	16,482	81,857
W. A. Valentine (R).....	10,813	11,440	9,908	10,039	13,340	14,610	18,871	89,021
John S. Fine (R).....	10,885	11,502	10,040	10,368	13,320	14,278	18,364	88,757

District Attorney	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Edward F. McGovern (D.)	11,363	9,738	11,535	8,830	10,327	10,987	16,232	79,007
Leon Schwartz (R).....	11,883	11,936	10,194	10,774	13,683	14,566	18,795	91,781

Sheriff	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
G. Lester Thomas (D.)...	11,404	9,776	11,457	9,040	10,240	10,839	15,457	78,213
Dallas Shobert (R).....	11,469	11,642	9,863	10,131	13,367	14,310	18,811	89,583

Commissioners (3)	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John A. Riley (D).....	11,512	9,869	11,720	8,996	10,179	10,940	15,810	79,026
Stanley Janowski (D.)....	11,530	9,957	11,734	9,976	10,357	10,985	15,714	80,247
John A. MacGuffie (R.)..	11,671	11,735	10,024	10,196	13,685	14,760	19,152	91,223
Robert Lloyd (R).....	11,543	11,850	9,866	9,881	13,444	14,458	18,613	89,655

Treasurer	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John Kridlo (D.).....	11,387	9,641	11,581	9,006	9,994	10,772	15,111	77,492
John B. Wallis, Jr. (R.)..	11,549	11,746	9,783	10,165	13,486	14,359	18,863	89,951

Register of Wills	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Ralph Gitz (D.).....	11,861	9,631	11,049	8,848	9,779	10,475	15,090	76,821
John Shivell (R).....	11,263	11,804	10,460	10,324	13,768	14,679	19,317	91,615

Recorder	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Joseph Bialogowicz (D.)..	11,372	9,801	11,351	9,036	10,325	10,750	15,501	78,136
Charles Bufalino (R).....	11,533	11,563	10,103	10,072	13,411	14,383	18,749	89,817

Coroner	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	15,428	78,151

PHOTOSTAT OF PAGE 32 OF WII

William H. Keller (R.)...	11,470	11,000	9,024	10,104	13,200	14,004	15,000	88,449

Common Pleas Court (2)	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John H. Bonin (D.).....	13,733	10,608	11,952	9,907	10,783	11,515	15,976	84,474
M. F. McDonald (D.).....	12,030	10,159	12,020	9,168	10,569	11,429	16,482	81,857
W. A. Valentine (R.).....	10,813	11,440	9,908	10,039	13,340	14,610	18,871	89,021
John S. Fine (R.).....	10,885	11,502	10,040	10,368	13,320	14,278	18,364	88,757

District Attorney	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Edward F. McGovern (D.)	11,363	9,738	11,535	8,830	10,327	10,987	16,232	79,007
Leon Schwartz (R.).....	11,883	11,936	10,194	10,774	13,633	14,566	18,795	91,781

Sheriff	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
G. Lester Thomas (D.)...	11,404	9,776	11,457	9,040	10,240	10,839	15,457	78,213
Dallas Shobert (R.).....	11,469	11,642	9,863	10,121	13,367	14,310	18,811	89,583

Commissioners (3)	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John A. Riley (D).....	11,512	9,869	11,720	8,996	10,179	10,940	15,810	79,026
Stanley Janowski (D.)....	11,530	9,957	11,734	9,976	10,357	10,985	15,714	80,247
John A. MacGuffie (R.)..	11,671	11,735	10,024	10,196	13,685	14,760	19,152	91,223
Robert Lloyd (R.).....	11,543	11,850	9,866	9,881	13,444	14,458	18,613	89,655

Treasurer	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
John Kridlo (D.).....	11,387	9,641	11,581	9,006	9,994	10,772	15,111	77,492
John B. Wallis, Jr. (R.)..	11,549	11,746	9,783	10,165	13,486	14,359	18,863	89,951

Register of Wills	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Ralph Gitz (D.).....	11,861	9,631	11,049	8,848	9,779	10,475	15,090	76,821
John Shivell (R.).....	11,263	11,804	10,460	10,324	13,768	14,679	19,317	91,615

Recorder	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Joseph Bialogowicz (D.)..	11,372	9,801	11,351	9,036	10,325	10,750	15,501	78,136
Charles Bufalino (R.).....	11,533	11,563	10,103	10,072	13,411	14,383	18,749	89,817

Coroner	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Stanley Leonard (D.)....	11,305	9,626	11,948	8,994	9,981	10,848	15,428	78,151
Lewis S. Reese, Jr. (R.)..	11,587	11,724	9,598	10,195	13,449	14,382	18,781	89,849

Surveyor	1st D.	2nd D.	3rd D.	4th D.	5th D.	6th D.	7th D.	Totals
Steve Guido (D.).....	11,263	9,584	11,355	8,927	9,964	10,699	15,293	77,085
Michael Adomshick (R.)..	11,605	11,643	9,805	10,084	13,449	14,223	18,659	89,468

OFFICIAL STATE VOTE FOR JUDICIAL VACANCIES

Supreme Court—Marion D. Patterson (R.), 1,700,358; Herbert F. Goodrich (D.), 1,358,874.

Superior Court—J. Harold Flannery (D.), 1,346,977; E. J. Thompson (D.), 1,340,273; William H. Keller (D.), 1,309,777; William H. Keller (R.), 1,585,639; Thomas Baldrige (R.), 1,673,184; William E. Hirt (R.), 1,658,597.